

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEE BOYCE)	
Claimant)	
VS.)	
)	Docket No. 247,952
RUSSELL BEAL & DONNA BEAL dba)	
FAMILY EXPRESS)	
Respondent)	
Uninsured)	

LEE BOYCE)	
Claimant)	
VS.)	
)	Docket No. 247,953
NORDIC TRUCKING, INC.)	
Respondent)	
AND)	
)	
GREAT WEST CASUALTY)	
Insurance Carrier)	

LEE BOYCE)	
Claimant)	
VS.)	
)	Docket No. 253,038
ROGERS & SON CONCRETE)	
Respondent)	
AND)	
)	
SAFECO INSURANCE CO. OF AMERICA)	
Insurance Carrier)	

ORDER

Claimant appealed the preliminary hearing Order dated July 26, 2000, entered by Administrative Law Judge Steven J. Howard.

ISSUES

Claimant alleges he was injured on January 21, 1999 while working for either Russell "Rusty" and Donna Beal dba Family Express (Beal) or Nordic Trucking, Inc. (Nordic). Thereafter, he allegedly aggravated his injury on September 23, 1999 while working for Rogers & Son Concrete (Rogers). Judge Howard denied claimant's request for preliminary benefits finding claimant failed to prove that he was working on January 21, 1999, and further failed to prove he gave timely notice of accident. The issues on this appeal are:

- (1) Did claimant sustain personal injury by accident arising out of and in the course of employment with any of the three respondents?¹
- (2) If so, did claimant provide timely notice of accident?²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds the Order should be affirmed.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.⁵

An accidental injury is compensable under the Workers Compensation Act where the accident arose out of and in the course of employment.⁶ The question of whether

¹ K.S.A. 1999 Supp. 44-501.

² K.S.A. 44-520.

³ K.S.A. 1999 Supp. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

⁴ K.S.A. 1999 Supp. 44-508(g). *See also* In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 1999 Supp. 44-501(g).

⁶ K.S.A. 1999 Supp. 44-501(a); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

there has been an accidental injury arising out of and in the course of employment is a question of fact.⁷

Claimant, while working as an over the road truck driver for either Beal or Nordic, on January 21, 1999 allegedly injured his left knee when the wind blew the door of his cab into his knee as he was exiting the truck. He also alleges he injured his left wrist that same day. At his April 3, 2000 Discovery Deposition, claimant said he called the dispatcher at Nordic but was told he would have to report the accident to the Beals. He then drove from Kansas City, Kansas, to Ft. Scott, Kansas. When claimant arrived in Ft. Scott he allegedly saw Rusty Beal and reported the injury to his knee. The wrist injury gradually improved but the knee pain never went away.

Claimant did not seek medical treatment for his knee injury until April of 1999 when he went on his own to the emergency room of Mercy Hospital in Ft. Scott. Both respondents deny claimant ever reported an accident or injury at work and, therefore, both deny timely notice was given of an accident arising out of and in the course of employment. Claimant's dispatcher at Nordic, Jay McMinn, who is no longer employed by Nordic, testified by affidavit that he is the person claimant would have spoken to on the date of the alleged accident. He denies that claimant ever told him that he had an injury on the job. Furthermore, if he had reported an injury, Mr. McMinn said he would have immediately contacted Arie Brouwer, the line haul manager, or John Klapp, the terminal manager, whichever was available.

Claimant testified first, in his discovery deposition, that he telephoned the dispatcher at Nordic from Kansas City, and upon his return to Ft. Scott he spoke directly with Rusty Beal. Later, at the preliminary hearing before Judge Howard, claimant said he telephoned Donna Beal from Kansas City and never spoke to Rusty Beal about his injury.

Q. Tell the Judge what happened on January 21, 1999.

A. I opened the door up to get out of the cab. I had been driving for quite awhile. I wasn't aware that the wind was blowing. I opened the door up and I stuck my left leg out, commencing to crawl out of the truck, and the door slammed it on my knee. I pulled it back in, grabbed my knee, and shut the door and held it. Then I went in and I called them and I told Rusty and Donna Beal that I had hurt myself.

Q. Where were you at physically? What town were you at when this occurred?

A. Kansas City.⁸

⁷ Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

⁸ Prel. H. Transcript at 11.

Q. So your testimony today is that when you injured your knee on January 21, 1999, you used a phone card and called Donna Beal at Family Express and reported it to her?

A. Yes, sir.

Q. And your testimony also is that you have never told Rusty Beal about your injury; correct?

A. He wasn't around.⁹

Rusty Beal testified that claimant made a delivery to the Associated Wholesale Grocers warehouse in Kansas City, Kansas, on January 20, 1999, and did not go back out again until the 26th or 28th of January. Mr. Beal denies that claimant made a Kansas City delivery on January 21, 1999 and also denies that he and Donna were even in Ft. Scott on that date. According to the Beals, claimant never gave either of them notice of accident. The first they heard of an alleged work related injury was apparently when they received the letter from claimant's attorney dated April 30, 1999.

Another inconsistency involves the name of the Nordic dispatcher claimant allegedly talked to. The dispatcher's name changed in the discovery deposition from "Shane" to "Matt", and at the preliminary hearing it became "Skip". Mr. Richard "Skip" Meyer testified that if Jay McMinn wasn't available, he or Tim would get the call, but that claimant never reported an accident or an injury to him.

The purposes of the notice requirement are primarily to give the employer an opportunity to investigate the facts while still fresh and to alert the employer to the possibility of an injury, so the employer can provide prompt medical treatment, if necessary, and/or make accommodations to prevent further injury.¹⁰ Unless claimant is believed, it cannot be said that these purposes were all satisfied in this case. There is no allegation that either respondent had actual knowledge of the accident so as to make the giving of formal notice unnecessary.¹¹ Therefore, claimant's testimony is necessary to establish notice.

There is a dispute about whether or not claimant reported his injury. Respondents challenge claimant's credibility because his testimony about what he said to the dispatcher and to Rusty or Donna Beal is inconsistent and conflicts with the testimony of the other witnesses. Furthermore, the testimony is contradictory as to whether the injury occurred

⁹ Prel. H. Transcript at 31.

¹⁰ See Injured Workers of Kansas v. Franklin, 262 Kan. 840, 942 P.2d 591 (1997); see also Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

¹¹ See Cross v. Wichita Compressed Steel Co., 187 Kan. 344, 348, 356 P.2d 804 (1960); Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980).

at work on January 21, 1999, as claimant described. Credibility, therefore, is important to a resolution of this issue. Judge Howard observed claimant testify and apparently found claimant's testimony was not persuasive. Giving some deference to this conclusion, and after considering the testimony of Mr. Boyce, Mr. Meyer, Mr. Beal, and Mrs. Beal, together with the affidavit of Mr. McMinn and the medical records in evidence, the Appeals Board agrees. Therefore, the Appeals Board finds and concludes that claimant has failed to prove that he sustained personal injury by accident arising out of and in the course of his employment with either respondent Beal or respondent Nordic on January 21, 1999, and has failed to prove that timely notice of any such accident was given. Because of this conclusion, the Board does not reach the question of an employment relationship between claimant and Nordic versus claimant and Beal, and the issue of coverage under the Act.

It appears that claimant's current request for temporary total disability compensation and medical treatment is not for the alleged accident at work on September 23, 1999, while employed by Rogers. Claimant agrees that this accident caused only a temporary aggravation to his knee. Although Judge Howard's Order did not specifically address this accident, temporary total disability compensation and medical treatment were denied for all three claims. It appears that as to Docket No. 253,038, the ALJ was making a finding that claimant was not currently in need of preliminary hearing benefits due to the September 23, 1999 accident. For purposes of this appeal, claimant seems to agree. Claimant's letter brief to the Board challenges the ALJ's findings as to the alleged January 21, 1999 accident, but as to the alleged September 23, 1999 accident states "claimant had a subsequent accident with Roger and Son's Concrete which has appeared to have resolved to its baseline condition." The Board, accordingly, need not address the compensability of the alleged September 23, 1999, accident.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.¹²

WHEREFORE, the Appeals Board affirms the Order dated July 21, 2000, entered by Administrative Law Judge Steven J. Howard.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

¹² K.S.A. 1999 Supp. 44-534a(a)(2).

LEE BOYCE

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**DOCKET NOS. 247,952;
247,953; 253,038**

c: William L. Phalen, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
Daniel L. Doyle, Kansas City, MO
Clifford K. Stubbs, Lenexa, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director